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MONTANA PROSECUTOR

MAY - JUNE, 1979 VOL 3, No. 2

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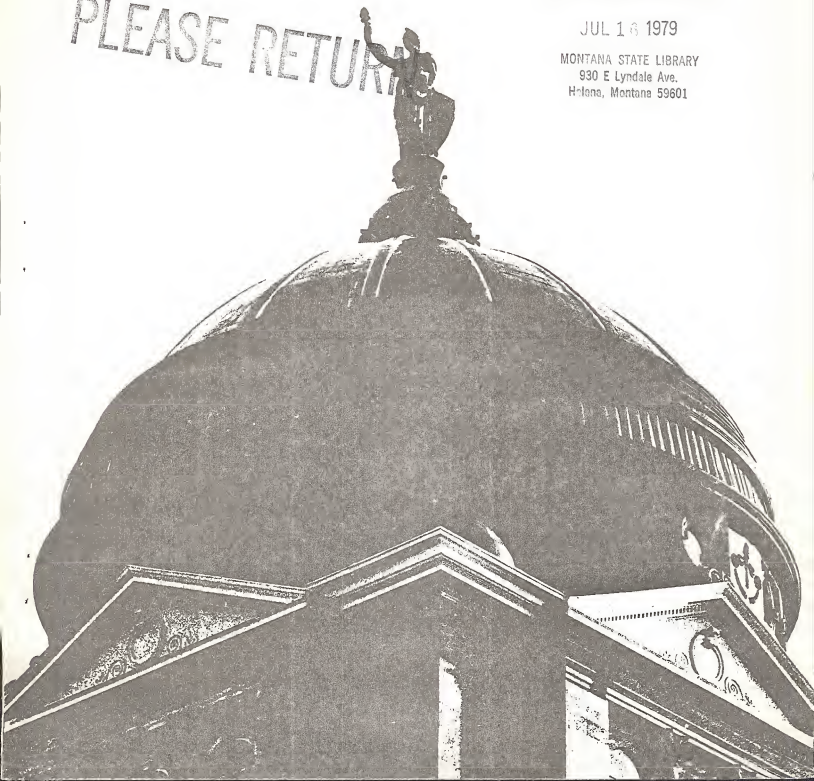


INTRODUCTORY NOTES

The Montana County Attorney's Associations annual conference will be held at Fairmont Hot Springs. The dates of the convention will be July 25, 26, 27 and 28, 1979. A schedule of events will be mailed out to all county attorneys by Ron Smith.

All funds for out-of-state prosecutor training allocated by the Montana Board of Crime Control for this Federal fiscal year have been expended. As a result, funds for out-of-state training will not be available until after October 1, 1979.

Included within this issue are two articles, one by Leon Jaworski and the other concerning public defenders, both of which were furnished by the California District Attorney's Association.

Also included is a copy of a resolution recently passed by the National Association of Attorneys General regarding the rescission of Federal financial participation in child support enforcement. County Attorneys may wish to contact their Congressional representatives regarding the rescission.

RECENT CASES AND NOTES

COMPETENCY OF COUNSEL

Telling the court that defendant's motion to withdraw his guilty plea to second degree murder was against counsel's advice did not make counsel ineffective. Counsel made the motion, argued it, was aware that a guilty plea cannot be withdrawn just because defendant changed his mind and that successfully withdrawing the plea could have subjected defendant to the death penalty. State v. Weatherholt (Ariz.) 589 P.2d 883.

AUTOMOBILE SEARCH

Defendant who was using auto "borrowed" from loan shark victim in commission of offense had no reasonable expectation of privacy in auto, so he had insufficient interest in premises searched to complain of inventory search. Where defendant was not charged with possession of loan-sharking or prostitution records, he had no property right in records, and had no standing to complain of their seizure. United States v. Ochs (S.D.N.Y.) 461 F.Supp. 1.

CHILD ABUSE

Testimony by a doctor that the child had various fractures of differing ages, amounting to the battered child syndrome, was properly admitted in defendant's trial for child abuse. There was evidence the child was exclusively under parental control, and the testimony rebutted the defense of accident. People v. Ellis (Col.App.) 589 P.2d 494.

CONFLICT OF INTEREST

Prosecuting attorney's action in representing victim's widow in civil suit at same time as criminal prosecution of defendant constituted a conflict of interest without necessity of defendant having to show prejudice. Even though prosecutor's action was unintentional, a new trial was granted. Commonwealth v. Tabor (Mass.) 384 N.E.2d 190.

CREDIT FOR TIME SERVED

Defendant was not entitled to credit for time served prior to trial when he was in custody serving a prison term for a prior unrelated offense. In Re Rojas (Sup.) Cal.Rptr. 649.

Defendant is entitled to credit only for the pre-trial time served as a result of the charge for which he is ultimately convicted. If defendant is being incarcerated for another crime at the same time as awaiting trial for principal offense, he deserves no credit for time served. In Re Hodges (App.) 152 Cal.Rptr. 394.

CROSS-EXAMINATION

Where defendant testified during direct examination that he never dealt in or used heroin, prosecutor was properly permitted to attempt to impeach defendant on cross-examination by asking him to roll up his sleeves, despite an objection that, if there were track marks, no foundation had been laid to show that they were the result of heroin addiction. State v. Barnes (La.) 365 So.2d 1282.

DWI

Failure of arresting officers to give defendant Miranda warnings did not bar their testimony concerning defendant's drunken manner of speech. The officers did not testify to content of statement and the manner of speaking is not of testimonial nature and therefore not protected by Fifth Amendment. State v. Rauhauser (Iowa) 272 N.W.2d 432.

The lack of expertise of police officers to enable them to distinguish between behavior caused by injuries suffered in the accident and behavior caused by intoxication did not prevent them from giving their opinion that defendant was under the influence of intoxicants. The lack of expertise went to the weight of their testimony, not its admissibility. State v. Meisbauer (Kan.App.) 588 P.2d 953.

BATHING BIAS

Defendant's right to a fair trial was not infringed and trial court did not either abuse its discretion or display prejudicial bias by ordering defendant to bathe because judge believed defendant's strong body odor would have an adverse effect on jury. Sapata v. State (Texas Cr.App.) 574 S.W.2d 770.

DEATH PENALTY - VOIR DIRE

Use of death qualification voir dire questions does not violate the 5th, 6th, and 14th amendments. Since a juror may be excluded because he opposes the death penalty, he may be questioned to find out if he opposes imposition of the death penalty. Wayne v. Commonwealth (Va.) 251 S.E.2d 202.

GUILTY PLEA

By entering a knowing, voluntary, and intelligent guilty plea, defendant waives all nonjurisdictional claims, which includes claims regarding Miranda warnings, coerced confessions, perjury, and illegal searches and seizures. Franklin v. United States (5th Cir.) 589 F.2d 192.

IMPEACHMENT - PRIOR CONVICTION

Because offense of burglary with intent to commit theft involves the character trait of dishonesty or untruthfulness, a prior conviction has substantial probative value for witness impeachment and may be used against testifying defendant. Court distinguishes burglary with intent to commit rape from burglary with intent to commit theft with the latter being more probative for impeachment purposes. People v. Coleman (App.) 152 Cal.Rptr. 407.

INDIGENT EXPERTS

Indigent defendant was not denied Due Process by trial court's refusal to allow his appointed counsel funds for employment of experts to examine fingerprints and typewriting evidence in possession of Government and to give them an opportunity to contest testimony of FBI experts as to such evidence. The experts would have supplied at best only minimal helpful evidence and advisory support, so the trial court's denial did not prejudice defendant. United States v. Spaulding (9th Cir.) 588 F.2d 669.

INTERROGATION

When interrogating officers had no knowledge that defendant had retained counsel at the time they obtained his confession, suppression of the statement was not required on ground it was obtained in absence of counsel. State v. Alexander (La.) 365 So.2d 1337.

JURISDICTION - CUSTODIAL INTERFERENCE

Statute making detention of one's own child outside of state, with intent to deny another's right under an existing court order, a felony, constitutes an invalid exercise of extra-territorial criminal jurisdiction. Defendant could, however, be held in contempt for violating court order. State v. McCormick (Minn.) 273 N.W.2d 624.

MENTAL COMPETENCY

Drug addiction, standing alone, does not qualify as a mental disease or defect which would support a finding of lack of criminal responsibility. Commonwealth v. Sheehan (Mass.) 383 N.E.2d 1115.

PRESUMPTIONS

Statute which allows knowledge that property was stolen to be inferred from evidence that identifying numbers on property were altered or removed does not violate the privilege against self-incrimination. People v. Gallagher (Mich.) 273 N.W.2d 440.

MISTRIAL - PROSECUTOR MISCONDUCT

Misconduct of prosecutor, be it negligent or intentional, which is not intended to provoke a mistrial, but which causes defendant to move for a mistrial, does not bar subsequent trial on ground of double jeopardy. Bell v. State (Md.Sp.App.) 395 A.2d 1200.

PROSECUTOR - DISCRETION

Prosecutor's policy of not charging a person with issuance of worthless checks if he makes full restitution within 5 days of demand did not violate equal protection. There was no showing of a systematic and persistent discrimination against poor people, and there was a rational basis for the policy. Locklear v. State (Wisc.) 273 N.E.2d 334.

SEARCH AND SEIZURE

Even if an officer trespassed by going to a tree to wait for a ride in the shade, his observations of marijuana plants in defendant's back yard could not be suppressed. Defendant didn't have a reasonable expectation of privacy in the plants. The general public could see the plants from his driveway and the policeman would have seen the plants except defendant's laundry had been in the way when the officer was in the driveway. State v. Brighter (Hawaii) 589 P.2d 257.

STATUTE OF LIMITATIONS

Statute of limitations for crime of receiving stolen property does not begin to run until possession ends because until that time the possession constitutes a continuing course of conduct. State v. Reeves (Ark.) 574 S.W.2d 647.

TRESPASS

Even if defendant was invited onto property (Seabrook Nuclear Power Plant), she could be convicted of criminal trespass when she remained after she was ordered to leave. State v. Dupuy (N.H.) 395 A.2d 851.

WAIVER

Where testimony is admitted erroneously over objection and the same testimony or testimony to the same effect is later admitted without objection, the objection in the first instance is waived. Kirvin v. State (Texas Cr.App.) 575 S.W.2d 301.

WEAPONS

The test for whether an item is a deadly or dangerous weapon is a "usage test", so that a stapler used as a bludgeon constitutes a deadly weapon. It is not the original intended use of the object which is important, but the manner in which it is used during the crime. Cummings v. State (Ind.) 384 N.E.2d 605.

A Boy Scout knife with a blade two and 3/8 inches long was properly held to be a deadly weapon, since it was used to administer stab wounds near the throat and underarm, where major blood vessels lie. State v. Cobb (Wash.App.) 589 P.2d 297.

MIRANDA - DRUGS - DECEPTION

The defendant, on trial for murder, did not convince the Maryland Court of Special Appeals that his confession was induced either by the drugs he was on at the time or by the interrogating officer's statement that all he wanted to do was "shake the hand of the man" who murdered the "no good son-of-a-bitch." The Court held that deception is a "valid weapon of the police arsenal and only if it overbears the will is it impermissible. The prosecution proved by a preponderance of the evidence that the confession was voluntary. Rowe v. State, 25 Cr.L. 2027, CA 10.

PLEA AGREEMENT - CONDITIONS

A "get out of the state" condition to a plea agreement is an unenforceable condition of a guilty plea. "To permit one state to dump its convict criminals into another....is prohibited by public policy. Rutherford v. Blankenship, 25 CrL 2035, USDC Va.

CO-CONSPIRATOR STATEMENTS - GUIDELINES

The Fifth Circuit holds that the judge alone must determine admissibility of such statements. The Court notes that there must be "substantial" evidence establishing the conspiracy in order to introduce the statements and that, whenever possible, the prosecution must put on its proof of conspiracy before the hearsay is introduced. If that is not possible, however, the statement may be admitted subject to later connection. U.S. v. James, 24 CrL 2526, CA5.

MIRANDA - MURDER SCENE QUESTIONING

A police officer's 10 minute interrogation of a murder defendant in a small laundry room adjacent to where the defendant had just been found covered with blood and kneeling beside the corpse was general on-the-scene questioning, not custodial interrogation. Borodine v. Douzanis, 24 CrL 2532, CA 1.

SEARCH AND SEIZURE - BEEPER

The use of a "beeper" to monitor an airplane's location in flight is not a search. The actual installation of a "beeper", however, does implicate the Fourth Amendment. In this case, the installation was reasonable. It was consented to by the owner of the plane one day defore another man assumed ownership and began using it to smuggle drugs. U.S. v. Bruneau, 24 CrL 2535, CA 8.

INFRACTION TRIAL DOES NOT NEED PROSECUTOR

The California Supreme Court, faced with two defendants complaining about the absence of a prosecutor from their traffic infractions trials concluded the presiding judge did not deprive the defendants of due process or a fair trial by calling and questioning witnesses without the presence of a prosecutor. People v. Carlucci, 24 Cr.L. 2484.

POLICE MUST ASSIST CHILDREN AFTER CUSTODIAN'S ARREST

The Seventh Circuit has determined that a police officer who took a drag racer into custody and left two children unattended in a health-endangering situation on a Chicago freeway was properly subjected to a 42 U.S.C. 1983 claim. Under the Fourteenth Amendment's Due Process Clause, the police conduct was shocking to the conscience and violated the children's right to personal security. White v. Rochford, 24 Cr.L. 2477.

CARELESS DRIVING STATUTE FOUND UNCONSTITUTIONAL

In State v. Huffman, 202 Neb. 434, the Supreme Court of Nebraska held Neb. Rev. Stat., Section 39-669, which provided that any person operating a vehicle in a manner likely to endanger any person or property shall be guilty of careless driving did not meet the tests of being reasonably clear and definite and was therefore void for vagueness.

RIGHT TO COUNSEL NOT EXPANDED

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the United States Supreme Court concluded that an indigent misdemeanant could not be sentenced to imprisonment unless the state afforded him his right to court-appointed counsel at his prosecution. Now, in Scott v. Illinois, 24 Cr.L. 3053, the five-justice majority has refused to extend the right to counsel for misdemeanor prosecutions in which a statute authorizes imprisonment but none is imposed.

FOUR-YEAR-OLD WITNESS ALLOWED TO TESTIFY

In In re R.R., 24 Cr.L. 2433, the New Jersey Supreme Court has decided a four-year-old witness should be allowed to testify at a hearing which involved a teen-aged boy accused of having sexual misconduct with the infant since the infant understood he had a duty to speak the truth.

GUILTY PLEA

Failure to advise defendant that he could serve more time in jail as a probation condition than he could get if he were sent to prison meant defendant's plea was involuntary. State v. Cutler (Ariz.) 590 P.2d 444.

LESSER INCLUDED OFFENSE - INSTRUCTIONS

Theft is a lesser included offense of robbery, since the jury could have believed that no force or fear was present and convicted defendant of theft. Since no lesser included theft instruction was given, defendant's robbery conviction was reversed. (But his simultaneous burglary conviction was affirmed). State v. Jackson (Ariz.) 589 P.2d 1309.

LIES - PROBABLE CAUSE

"A false answer in response to questions by the police based on the police officer's personal knowledge may constitute probable cause," and did so here, where there was no discernible innocent or plausible explanation for the lie. (Officer asked member of group from which odor of marijuana came what was in his pocket, and defendant said "nothing," in spite of his bulging pocket.) State v. Valenzuela (Ariz.) 589 P.2d 1306.

PROBABLE CAUSE - ODOR

Statements in an affidavit that the officer was trained in identifying marijuana smell, that the residence smelled of burned marijuana, and the officer had seen a bamboo pipe smelling of marijuana constituted probable cause for a search warrant for the house. State v. Warren, (Ariz.), 589 P.2d 1338.

SENTENCE

It was unnecessary to bring defendant back for resentencing when one of his prior convictions was overturned, since the trial judge said that even if he had known of the invalidity of the conviction, the sentence would have been the same. Portillo v. United States (9th Cir.) 588 F.2d 714.

STANDING - SEARCH & SEIZURE

Defendants lacked standing to contest the stop and search of a loaded car even though the search produced evidence used against them, since they were not present at the search and did not establish ownership or control of the car, and were not present during the stop and search. State v. Warren, (Ariz.) 589 P.2d 1338.

DISCOVERY

Because "the rules of the game should not be changed after play is in progress," prosecutor's failure to respond in writing to defense attorney's request for discovery was not error. The prosecutor followed established custom of opening his files for defense attorney's inspection, and the custom was fully disclosed to defense attorney at beginning of case. Cardwell v. State (Ark.) 575 S.W.2d 682.

DISCOVERY - INSTRUCTION

After defendant, an attorney, interviewed some of the witnesses against him, each disavowed his previous statement implicating defendant. Because of this pattern the judge properly instructed the jury that if it believed the defendant attempted to suppress evidence it could infer consciousness of guilt. United States v. Reamer (4th Cir.,) 589 F.2d 769.

DRUGS AND NARCOTICS

Although back seat passenger admitted that heroin was in his exclusive control at all times and that he had placed it under back seat, where it was found when the car was stopped by police, there was sufficient evidence to convict the driver for possession of heroin. There was evidence of other drug - related paraphernalia found in the trunk, under the front seat and in the pocket of a coat belonging to driver. State v. Larson (N.D.) 274 N.W.2d 884.

PRIOR BAD ACTS

The Ninth Circuit reaffirms its holding that Rule 404(b) "is a rule of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition.'" United States v. Herrell (9th Cir.) 589 F.2d 711.

SEARCH AND SEIZURE

Officers were justified in reentering a house to seal a gas can they had inadvertently left behind when they searched the house. There was no seizure. They merely acted to preserve evidence, which they persuaded the wife to bring to the police station four days later. People v. Hinchman (Colo.) 589 P.2d 917.

PRIOR CONVICTIONS DRUGS AND NARCOTICS

Admission of defendant's convictions for possession and distribution of heroin were properly admitted under Rule 609 in defendant's trial for distribution of heroin. In addition, the prior convictions were properly admitted to show intent under Rule 404(b). United States v. Hall (8th Cir.) 588 F.2d 613.

PRISON - MIRANDA

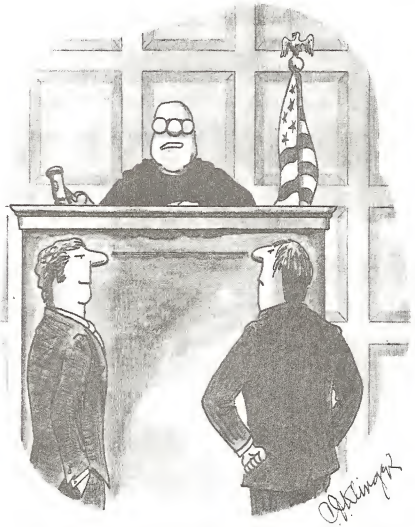
The Ninth Circuit holds that the custody test should not be strictly applied to prison interrogations and instead looks at the language used to summon the person, the physical surroundings, the extent to which he is confronted with incriminating evidence and what additional pressure was added to detain him. Asking a prisoner waiting for an interview in the prison library about the green substance in his matchbox was not questioning requiring Miranda. Cervantes v. Walker (9th Cir.) 589 F.2d 424.

PRIVILEGE - SEARCH AND SEIZURE

Telephone conversation between defendant and a social worker in which defendant told the social worker "I just killed somebody" was not privileged in view of the fact that defendant told the social worker that he understood the need for advising police before he furnished the social worker with his address, which indicated that he did not intend that the conversation be confidential. The case is also a good search and seizure "second search" case, if it gets past certiorari. State v. Martin (S.D.) 274 N.W.2d 893.

SEARCH AND SEIZURE

Inserting electronic beepers and flourescent powder in a shipment of cocaine discovered in a proper border search is upheld. Tracking the cocaine to its destination, making a warrantless entry to secure the house, then getting a search warrant is commended as disclosing considerable restraint. United States v. Botero (9th Cir.) 589 F.2d 430.



"The defense counsel is reminded that cases involving Perry Mason cannot be cited as legal precedent."

COUNTY HAD DUTY TO WARN OF DANGEROUSNESS OF DELINQUENT

Reversing the dismissal of a civil complaint, the California Court of Appeals, First District, held that the state immunity statute did not shield a county from a damage suit for its negligence in failing to warn foreseeable victims of the dangerous propensities of a juvenile delinquent. Thompson v. County of Almeda, 24 Cr.L. 2478.

A juvenile delinquent, with a history of mental disorders, was released to the custody of his mother and within 24 hours had sexually assaulted and murdered a five-year-old boy. The plaintiff brought a wrongful death action against the county alleging, in pertinent part, its failure to give warning that the juvenile had extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children were a likely result of his release, thereby constituting gross negligence for which the county was liable.

The issue involved was whether the county was liable for the tortious acts of the delinquent. Relying on Johnson v. State, 69 Cal.2d 782 (1968), and Tarasoff v. Regents of University of California, 17 Cal.3d 495 (1976), the Court concluded that the county was not shielded from liability. Johnson had determined that the state was not shielded from liability for its negligent act in failing to advise foster parents, to whom the Youth Authority had released a sixteen year-old boy, of the youth's dangerous propensities. Johnson also cited the Restatement of Torts, Second, Section 301(2)(b) which provides that one who creates a foreseeable risk not readily discoverable by the endangered persons has a duty to warn the other of the potential peril. Tarasoff had relied on the Restatement of Torts, Second, Section 319 which provides that a person who takes charge of a third person whom he knows, or should know, to be likely to cause harm to others is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. In this case the Court found a special relationship existed between the juvenile and the county creating a duty on the county to exercise reasonable care in regard to the youth's dangerous propensitites. This duty, the Court concluded, extended to the giving of warnings of homicidal tendencies and threats to known endangered persons, foreseeable victims, or to those persons who might reasonably be expected to act to protect such persons from the threatened harm.

The county had argued that panic would have ensued from a widespread warning that the delinquent was a dangerous person. The Court agreed that a public warning may not have been reasonable. However, a warning should have been issued to the police, the delinquent's mother, and perhaps a few nearby parents with young children.

SEARCH & SEIZURE

A group of people smoking a hand-rolled cigarette in a manner indicating useage of marijuana to an experienced officer, plus the odor of marijuana as the officer approached the group, justified the officer investigating further. Defendant's acts of putting his hand in his pocket, then making passing motions behind his back after he had been ordered to keep his hands in view, combined with the other information, were probable cause to search him, revealing marijuana. State v. Little (Ariz.) 590 P.2d 916.

SENTENCE

Three concurrent seven to seventeen year sentences for a first-time child molester are upheld despite the severe collateral consequences to defendant, and despite the probation officer and defendant's doctor both recommending probation. The charged offenses were merely part of a continuing series of molestations of the victim. Severe collateral consequences are no substitute for punishment, and the hardship to defendant was offset by the severity of the consequences defendant's depraved crime caused the victim and her family. State v. Jerousek (Ariz.) 590 P.2d 1366.

SUFFICIENT EVIDENCE

Evidence that the drug dealer told a narcotics officer that defendant was one of his people who brought the load up from Mexico, and that defendant was the one who told the narcotics officer where to go to complete the deal, was sufficient to sustain defendant's convictions for conspiracy and offer to sell, under an aid and abet theory. State v. Gracia (Ariz.) 590 P.2d 1363.

VOLUNTARINESS CONFESSION

Giving a defendant Miranda, telling him that the officer has probable cause to arrest him, then questioning him to get his side of the story before arresting him, is not an implied promise not to arrest if defendant cooperates. The admissibility of a confession secured by an officer who followed this policy is upheld in State v. Jerousek (Ariz.) 590 P.2d 1366.

ARGUMENT - COMMENT ON SILENCE

Stating that "the defendant said he was on a bus, excuse me, a defense witness said defendant was on a bus" (at the time of the crime) was a mere slip of the tongue, quickly corrected, not a comment on defendant's failure to testify. White v. State (Nev.) 591 P.2d 266.

CONTINUANCE

Failure to grant a continuance in the middle of trial so defendant could secure a witness was proper where inter alia the defense attorney had failed to subpoena the witness for trial, made no showing the witness would be available or would testify favorably and the testimony would have been merely cumulative corroboration of an alibi witness' alibi. The argument that the testimony became necessary as rebuttal during trial meets the rejoinder that trial continuances should be granted only in the most exigent circumstances. State v. Blodgette (Ariz.) 590 P.2d 931.

EXCITED UTTERANCES

Testimony about what a crying, shaking assault with a deadly weapon victim said fifteen minutes after the incident, partly in response to questions, was properly admitted under Rule 803(2). The excited utterances were "neither confusing, misleading, or unfairly prejudicial", so Rule 403 did not exclude them. State v. Yee, 590 P.2d 937.

INSTRUCTIONS

While contributing to the delinquency of a minor is a lesser included offense of child molesting, a jury instruction on it was unnecessary since there was no evidence to base it on. Defendant failed to offer an explanation, and instead relied on impeaching the victim, an either guilty or innocent situation. State v. Jerousek (Ariz.) 590 P.2d 1366.

MIRANDA - GUILTY PLEA

The Arizona Supreme Court holds that by entering an otherwise valid guilty plea, the defendant waives the involuntary confession issue. Defendant's competently - counseled guilty plea waived the issue of the voluntariness of the statements made after he requested his attorney, despite defendant's claim that the "involuntary" statements forced the guilty plea. State v. Leinweber (Ariz.) 590 P.2d 1381.

PRIOR BAD ACTS - SEX CRIMES

State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973) controls the admissibility of prior sex crimes, not State v. Treadway, 116 Ariz. 163, 568 P.2d 1061 (1977). Defendant's previous molestations of the same victim during the summer preceding his arrest on the instant child molestation charges, were properly admitted under either McFarlin, supra, or Rule 404 common plan or scheme. State v. Jerousek (Ariz.), 590 P.2d 1366.

ARGUMENT

Arguing that an alibi witness, who testified to things the police said were impossible and who owned the truck defendant and the stolen property were found in, was an accomplice was proper as a reasonable inference. State v. Blodgette (Ariz.) 590 P.2d 931.

COMPETENCY

The competency of a seven-year-old child molest victim to testify without a psychiatric exam is upheld here. The need for a psychiatric exam in sex cases would generally arise only if there was little or no corroboration and the effect of the victim's mental condition was raised by the defense. Here the victim's story was corroborated by independent witnesses and a confession, so refusing to require an exam was proper. State v. Jerousek, (Ariz.) 590 P.2d 1366.

COMPETENCY - PRIOR BAD ACTS

The victim's testimony about previous molestations was not too vague and was properly admitted, even though the seven-year-old victim could not be certain about the dates. Certainty about dates is not required of young witnesses, the testimony was corroborated and was sufficient to get the prior bad acts to a jury. State v. Jerousek (Ariz.) 590 P.2d 1366.

CONFRONTATION - LEADING QUESTIONS

Allowing the use of leading questions on direct examination of a minor witness is within the court's discretion and did not violate defendant's confrontation rights. The seven-year-old child molest victim did testify, was subject to extensive cross-examination, defendant couldn't offer an explanation and the questions weren't too suggestive or unfair, etc. State v. Jerousek (Ariz.) 590 P.2d 1366.

CONSPIRACY - DOUBLE PUNISHMENT

Where the only overt act alleged in the indictment was the substantive offense for which defendant was convicted, his convictions for conspiracy and offer to sell marijuana offended double punishment. The Supreme Court determined that the offer to sell carried the greater punishment and vacated the conspiracy conviction. State v. Gracia (Ariz.) 590 P.2d 1363.

SEXUAL ASSAULT

A specific jury finding that the victim was under 15 was unnecessary where the victim testified that she was seven at the time of the charged molestation, she obviously was under 15, and the information and instructions stated that the victim had to be under 15. State v. Jerousek (Ariz.) 590 P.2d 1366.

BOOTS - DEADLY WEAPONS

Defendant's conviction for assault with a deadly weapon, to wit his boots, is upheld here. He kicked the victim several times, getting blood on his boots and causing near-fatal injuries. Sankadota v. State (Okla.Cr.) 591 P.2d 324.

CHILD ABUSE - PRIOR BAD ACTS

Evidence of prior assaults on the same child is highly probative of intent in the charged assault, therefore, a motion in limine preventing the use of incidents prior to the date of the instant indictment is reversed. State v. Mills (Or.App.) 591 P.2d 396.

COMPETENCE OF COUNSEL

Otherwise adequate representation by counsel was not made inadequate merely because counsel had been suspended for failure to pay the registration fee. Counsel could have been reinstated merely by paying the registration fee and late penalty. Johnson v. State (Kan.) 590 P.2d 1082.

CONSPIRACY

Parties can commit conspiracy even though the substantive crime is impossible to commit, a fact which is mistakenly not known by the parties. United States v. Waldron (1st Cir.) 590 F.2d 33. See also United States v. Rose (7th Cir.) 590 F.2d 232.

DWI - PREJUDICE

Introduction of evidence of defendant's refusal to submit to chemical test to determine alcohol content of his blood did not violate defendant's privilege against self-incrimination. Exclusion of evidence that a second officer said he would give the arresting officer a medal because he had arrested the man who filed a complaint against the second officer was not abuse of discretion. People v. Thomas (N.Y.) 385 N.E.2d 584.

DECEPTION

The deception involved in breaking a promise that the answer would be just between the jailer and the prisoner did not overbear the prisoner's will to resist and the statement was properly admitted. Someone got a lot of war stories from this one, a defendant made an obscene gesture at the judge, the first defense witness threw water on the jury, a bomb exploded outside during a defense attorney's final argument, someone lost a piece of blood chipped from the wall, etc. State v. Gilcrist (Wash.) 590 P.2d 809.

DISCOVERY

Trial judge who did not want to have to wade through voluminous records to determine which were discoverable and so denied defendant's motion for an in-camera inspection because he had "better things to do than referee discovery" is told otherwise by the appellate court. The latter suggests that the judge review only those materials the government wishes expunged to minimize the burden. United State v. Conroy (5th Cir.) 589 F.2d 1258.

EAVESDROPPING - SEARCH AND SEIZURE

Defendants had no justifiable expectation of privacy with respect to their motel room conversations which were audible to the unaided ears of government agents pressed against a connecting door of an adjoining room the agents lawfully occupied. United States v. Jackson (5th Cir.) 588 F.2d 1046.

ENTRAPMENT - DURESS

Narcotics officers posing as gangsters, complete with guns, talk of eliminating snitches and the presence of the "family counselor" did not constitute entrapment as a matter of law. The narccotics officers' conduct did not constitute duress, and the claim that their conduct was so outrageous it violated due process was "'devoid of evidence and legal merit.'" People v. Bailey (Colo.App.) 590 P.2d 508.

FINGERPRINTS - PRIOR BAD ACTS

Nevada upholds a conviction based upon fingerprints found inside the burglarized room at the point of entry. Evidence of two other burglaries where appellant's fingerprints were found inside the burgled area was properly admitted in order to show identity. Reed v. State (Nev.) 591 P.2d 274.

FORFEITURE

It is not a defense in a forfeiture proceeding that the owner of the subject merchandise was acquitted in a criminal trial based on the use or possession of the merchandise. United States v. One Assortment of 93 Firearms (D.S.C.) 463 F.Supp. 365.

GRAND JURY

Information obtained through an illegal wiretap, as well as fruits of that surveillance, and the testimony of grand jury witnesses was admissible before the grand jury. Good discussion on the purposes and limited standing granted under the Exclusionary Rule. People v. McGrath (N.Y.) 385 N.E.2d 541.

IMPOSSIBILITY

Doctrine of factual impossibility - defendant properly convicted of attempt to distribute cocaine where substance he thought was cocaine was not. United States v. Quijada (9th Cir.) 588 F.2d 1253.

JUROR QUESTIONS

Trial court did not err in telling jury, before opening statements were given, that if a juror had a question during the trial, he should submit it in writing to the judge, who would ask the question if it was legally proper. Such practice did not encourage juror questions nor distort the roles of trial counsel, judge, and jury. United States v. Callahan (5th Cir.) 588 F.2d 1078.

JURY

After considering the case where California reversed because the prosecutor used his peremptory strikes to remove all blacks from the jury, Kansas declined to follow it, and followed the United States Supreme Court instead. The black defendant's conviction was upheld, even though all blacks were stricken from the panel. State v. Stewart (Kan.) 591 P.2d 166.

MOTION IN LIMINE

Violation of a court order not to mention that the officers went to the scene because of reports of a man brandishing a gun was proper, after the defense attorney asked the officers if they had drawn their guns when they got out of the car. The prosecutor had a right to let the officers give their explanation in order to rebut any adverse implications raised by the defense attorney. People v. Tenorio (Colo.) 590 P.2d 952.

PHOTOS

Otherwise admissible autopsy photos were not made inadmissible because they were enlarged to 16 x 20 so everyone could see while the expert testified. State v. Gutierrez (Kan.) 590 P.2d 1063.

PUBLIC DEFENDER

Once a court has determined that defendant is financially eligible for a public defender and has been appointed counsel, court may not later, without defendant's consent, remove that attorney on grounds of financial ineligibility. Rosewell v. Mun. Ct. (App.) 152 Cal.Rptr. 337.

PLEA AGREEMENT

The fact that after his guilty plea defendant assaulted a fellow prisoner, putting him in the intensive care unit of the hospital, was sufficient change of circumstances justifying the prosecution in changing its agreed upon recommendation. A defendant can't rely on an agreement when he commits another crime while awaiting sentencing. His failure to move to withdraw the plea when the state changed the agreed upon recommendation waived the issue. State v. Griebler (Wash.App.) 591 P.2d 465.

RAPE - INSTRUCTIONS

Idaho follows the trend in disapproving and rejecting the jury instruction that rape is an easy charge to make but hard to disprove. Modern studies show that the charge of rape is "difficult and traumatic to make and extremely difficult to establish in court". State v. Smoot (Idaho) 590 P.2d 1001.

RECEIVING STOLEN PROPERTY

A defendant may receive goods without selling them and may sell them without committing the offense of receiving, so receipt and sale of stolen property are different offenses for purpose of double jeopardy. United States v. Fowler (W.D.Va.) 463 F.Supp. 649.

SEARCH AND SEIZURE

Search incident to arrest was not invalidated by the fact that police did not conduct it immediately after arrest, nor at place of arrest, but rather moved defendant to a more private area so the search could be performed without endangering innocent bystanders and to spare defendant public embarrassment. People v. DeSantis (N.Y.) 385 N.E.2d 577.

SEARCH AND SEIZURE - BOATS

Boats, like automobiles, provide a lesser expectation of privacy than a home or office and are subject to frequent limited intrusions by regulatory and safety officials. The warrantless search of a boat was valid where it was motivated by a legitimate noncriminal purpose, it was limited in scope to that purpose and since the deputies had in fact a duty to conduct the search for safety reasons. United States v. Milles (1st Cri.) 589 F.2d 1117.

VOLUNTARINESS OF STATEMENT

The request of a "con-wise" defendant that his subsequent confession be "off the record" did not make the confession inadmissible. State v. Attebery (Or.App.) 591 P.2d 409.

EXPERT WITNESSES

It has been held that an indigent defendant who chooses not to be represented by the public defender is not entitled to the service of an expert witness or other implements of his defense at the expense of either the county or the State. "In providing for the system of representation of indigent defendants by a Public Defender, the State has fulfilled its obligation under Gideon v. Wainwright, supra...The State is not required to provide a means of defense through counsel of the defendant's choice at public expense....[par.] Nor do we perceive any good reason why the state should be required to provide for the payment of services other than legal representation when an indigent defendant chooses not to be represented by the public defender." The sole exception the Court found was that authorized by statute (N.J.S.A. 2A: 152-17) relating to the right to a transcript to use on appeal at the expense of the county where venue was laid. State v. Stockling, 390 A.2d 648, N.J.App., 1978.

PROSECUTING ATTORNEY - RECUSAL - BIAS

It was held in People v. Partlow, 148 Cal.Rptr. 744, Cal. App., 1978, that the involvement of the prosecutor in the set-up of the crime, and his presence at the time of the commission of the crime, and his signing of the information, did not require his recusal at trial on the ground of bias. The defendant had asserted that the prosecutor's personal knowledge of the facts of the crime provided an unusual advantage in the examination of certain witnesses, but the Court concluded that the facts of the case failed to reveal an intense personal involvement of the district attorney.

PROSECUTION ARGUMENT - GRIFFIN COMMENTS - "UNDISPUTED," "UNREFUTED"

A use of the terms "undisputed" and "unrefuted" by the prosecutor in his closing argument in referring to evidence presented during the trial did not amount to an unconstitutional comment upon the defendant's failure to testify. "At no time did the prosecutor refer directly to the defendant's failure to testify. There is some decisional language suggesting that if defendant was the only person who could have contradicted the State's testimony, a prosecutor's comment that his testimony has not been disputed may improperly draw attention to defendant's failure to testify. The test employed to determine if defendant's Fifth Amendment rights had been violated is whether the prosecutor's statement was of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify. ...Defendant has not indicated that persons other than defendant could not have conceivably denied the testimony that the prosecutor claimed as unrefuted. However, even if he had done so, we are convinced that the prosecutor's statements in this case, standing alone, were so subtle and so brief that they did not 'naturally and necessarily' emphasize defendant's testimonial silence." State v. Crawford, 584 P.2d 442, Wash.App., 1978.

PROSECUTION ARGUMENT - COMMENT ON DEFENDANT'S REFUSAL TO TAKE INTOXICATION TEST

The Supreme Court of Appeals of West Virginia has held that to allow evidence of a defendant's refusal to take a test to determine his state of intoxication to be admitted into evidence against him at his trial for driving under the influence of alcohol is equivalent to allowing comment by a prosecutor upon the defendant's failure to give evidence and is impermissible. State v. Adams, 247 S.E.2d 475, W. Va., 1978.

WARRANTLESS SEARCH - PROBABLE CAUSE - ODOR OF BURNED MARIJUANA

The Supreme Court of Michigan has held that in some circumstances the odor of burned marijuana may provide reason to believe that a particular person smoked it and, therefore, that there is probable cause for arrest, or that there is a quantity of unsmoked marijuana and, therefore, probable cause to search for it. In the instant case, however, the record supported neither conclusion. A police officer testified that he smelled "a distinct strong odor of marijuana coming from the car," and that in his opinion the marijuana had been smoked "quite recently." When asked whether "it could have been a day ago" and "be in the seats, in the fabric itself?", he answered: "It could be, but it was stronger." The officer acknowledged upon cross-examination that he had not been trained in determining the length of time a residual marijuana odor has lingered after being smoked and the defendant-driver of the automobile did not appear to the officer to be under the influence of marijuana. People v. Hilber, 259 N.W.2d 159, Mich., 1978.

CURTILAGE - LIMIT - OUTBUILDING

The Fifth Circuit Court of Appeals has drawn the limit for the curtilage doctrine with respect to outbuildings not encompassed by a fence, thus "Three possible ways of defining the curtilage suggest themselves: drawing the line an arbitrary distance from the most remote outbuilding in the curtilage, holding that the curtilage includes a 'reasonable zone' beyond the most remote outbuilding in the curtilage, or holding that the outer walls of the extreme outbuilding of the curtilage define the outer limits of the curtilage. Rejecting an arbitrary distance as being irrational and a 'reasonable zone' as being too vague for guidance, we hold that, as to outbuildings that are not encompassed by a fence that also includes the house, or perhaps a privacy or exclusionary one around them, the outer limits of the curtilage are defined by the walls of the remote outbuildings. Certainly such buildings give an added expectation of privacy for their contents, but we see none as to the area outside and beyond them." United States v. Williams, 581 F.2d 451, 5th Cir., 1978.

OPEN FIELD DOCTRINE - ENCLOSED FENCE

A warrantless search of a field, which was located in a rural area, on which marijuana was seen growing, and which was partially if not completely enclosed by a fence and which was allegedly posted on all sides and had a locked gate, was a search of an "open field" within the purview of the Fourth Amendment. "The trial court ruled, and we agree, that this search was not one protected by the United States Constitution but was a search of an 'open field' and therefore, permissible even without a warrant... [Defendant] argues that this field was enclosed, has no trespassing signs posted, has a locked gate, and, therefore could not be entered without a search warrant. [par.] The United States Constitution does not speak in terms of open or enclosed fields but rather says people have the right to be 'secure in their persons, houses, papers and effects against unreasonable searches and seizures..." ...This field, of course, was neither of the protected items described, nor was it an extension of [defendant] or his home. We cannot see extending the words of the Constitution to include this field as a protected item, place, or extension of a person even though it was fenced and entry could only be gained by climbing over a fence, cutting a fence or forcing a locked gate." Ford v. State , 569 S.W.2d 105, Ark., 1978.

MIRANDA - INTERROGATION - COMMENTS BY POLICE OFFICER AFTER DEFENDANT HAD EXERCISED HIS RIGHT TO REMAIN SILENT

Even though a drug enforcement agent, after the defendant invoked his right to remain silent and asked to see an attorney, went in and out of the room in which the defendant was sitting and told defendant that he would make known to the trial court any cooperation on the defendant's part, the agent's comments did not constitute interrogation or coercion in violation of defendant's right to remain silent, so as to render the volunteered statements of the defendant who reinitiated a conversation inadmissible as the product of an illegal interrogation or coercion. "These comments, however, constituted neither interrogation nor coercion. [Defendant] admitted that his rights had been read to him and that he understood them. When he reinitiated - unprompted by further interrogation - the dialogue with agent Martinez, he affirmatively demonstrated that he wished to waive his right to remain silent." United States v. Rieves, 580 F.2d 740, 5th Cir., 1978.

SEX OFFENSES - STATUTORY RAPE - DEFENSE OF REASONABLE MISTAKE OF FACT

The Supreme Court of Alaska has ruled, interpreting that state's statutory rape statute (AS 11.15.120), that if a defendant has a reasonable belief that the person with whom he has sexual intercourse is 16 years of age or older, he cannot be convicted of statutory rape. The Court read the defense of reasonable mistake of fact into the statute. It also read the statute as an intent crime, although there was no specific language of intent in the statute. State v. Guest, 583 P.2d 836, Alaska, 1978.

MIRANDA - ADEQUACY OF WARNINGS - NEED TO REPEAT THE WARNINGS

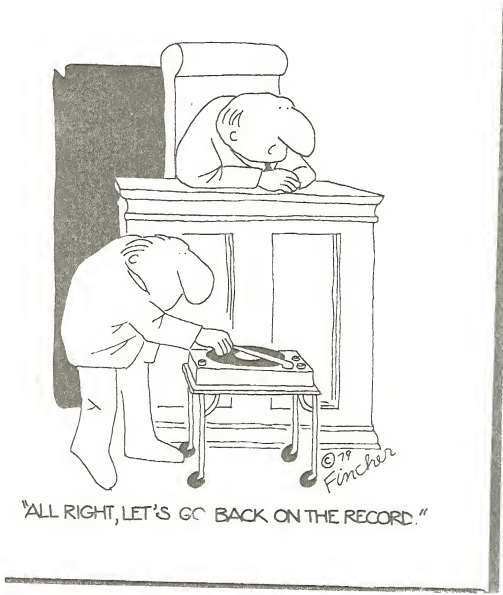
Where defendant has been given a complete set of Miranda warnings in the morning, seven hours before the interrogation which resulted in a confession, but was not given a complete warning immediately prior to the interrogation, his confession was admissible because he specifically acknowledged the earlier warning and responded with an affirmative gesture before the interrogation indicating that he understood his rights. The Court takes the position that the police are under no obligation to repeat the full Miranda warnings before every interrogation. "Defendant was in police custody all day in the company of the same officers who had given him the warning. He was aware at the outset of the purpose of the interrogation. Having fully informed defendant of his rights, the police were under no obligation to repeat a full Miranda warning. Under these circumstances, the reference to the earlier warning was adequate." State v. Reilly, 269 N.W.2d 343, Minn., 1978.

VOLUNTARINESS - MISAPPREHENSION CONCERNING EXTENT AND NATURE OF CRIMINAL LIABILITY

Where the defendant, who at the time of his arrest was 15 years old, misapprehended the extent of criminal liability to which his confession might subject him, in that he assertedly believed that he would not be tried as an adult, this did not affect the voluntariness of his confession. There was no evidence that anything was said to the juvenile or his parents implying that the juvenile would be charged in any specific court. The Court held that while it is necessary to the voluntariness of a confession that in making it the accused be aware of "the probable consequences of his act," not every misapprehension concerning the extent and nature of the criminal liability to which a confession may expose the accused vitiates the voluntariness of the confession. "The purpose of the right to the assistance of counsel is to allow the suspect to be advised of the precise ramifications and advisability of admitting anything. Appellant chose to rely instead on his own knowledge of the criminal justice system in deciding whether to waive his rights and made a statement. That his impressions were inaccurate does not render that decision involuntary or unknowing. Appellant's misapprehension of the extent of criminal liability to which his confession might subject him did not effect the voluntariness of his confession." Reed v. State, 379 N.E.2d 977. Ind., 1978.

FIFTH AMENDMENT PRIVILEGE - ADMISSIBILITY OF STATEMENTS MADE TO STATE-EMPLOYED PSYCHIATRIST

A defendant's constitutional privilege against self-incrimination was violated when the trial court permitted testimony by a state-employed psychiatrist, who had been employed to determine whether the defendant was capable of standing trial, to the effect that defendant had admitted the crime during the investigation. The instant Court drew a "sharp distinction between the use of the results of compulsory psychiatric examinations on the issue of insanity and the use of an incriminating statement made during a compulsory examination on the issue of guilt. The former is permissible; the latter is constitutionally forbidden. At least seven other United States Courts of Appeals have since indicated agreement without holding that this kind of statement cannot be used on the issue of guilt."...The same rule must apply in the state courts by force of the Fourteenth Amendment." Gibson v. Zahradnick, 581 F.2d 75, 4th Cir., 197%.



DISCOVERY

Refusing to bar a copy of the vehicle registration which wasn't disclosed until trial was not an abuse of discretion. Defendant didn't object about the lack of disclosure until later, there was no controversy over who owned the vehicle, and the owner testified that the vehicle was his. State v. Alvarado (Ariz.) 591 P.2d 973.

FORFEITURE - PLEA AGREEMENT

Forfeiture of a vehicle used to transport marijuana for personal use is proper and does not deny either equal protection or due process, no matter how small the amount of mari juana involved. A statement in a plea agreement in the possession case against defendant that the plea agreement did not affect any forfeiture proceedings was clear enough, but even if it wasn't, defendant had been given notice of the forfeiture proceedings prior to the plea agreement, which removed any ambiguity. Matter of One 1965 Ford Econoline Van, Et. (Ariz.) 591 P.2d 290.

OBSCENITY

Contemporary state standards in the statute and contemporary community standards apply to "patent offensiveness" as well as "prurient interest". State v. Bartanen (Ariz.) 591 P.2d 546.

SUFFICIENT EVIDENCE

The fact that four out of six stab wounds were fatal was sufficient evidence to sustain the jury verdict of malice aforethough and that the killing wasn't in self-defense. State v. Soule (Ariz.) 591 P.2d 993.

AIDING AND ABETTING

Fact that actual perpetrator of homicide had been convicted of manslaughter, and thus was implicitly acquitted of first degree murder, did not prevent defendant from being charged with first degree murder on theory that defendant aided, abetted, counseled or procured the actual perpetrator to commit the homicide. State v. McAllister (La.) 366 So.2d 1340.

ARGUMENT

Argument that the State wouldn't be here if it didn't think defendant committed negligent homicide was not an impermissible expression of personal belief. State v. Bier (Mont.) 591 P.2d 1115.

CO-DEFENDANT'S GUILTY PLEA

Fact that co-defendant pled guilty during course of trial to a substituted information was insufficient grounds for a motion for mistrial by defendant, where the plea was made out of presence of the jury and the court gave the jury curative instructions. State v. Griffin (Conn.) 397 A.2d 89.

DRUGS AND NARCOTICS

Testimony that a non-specific marijuana test kit reacted positively for marijuana, coupled with a deputy's testimony that his experience indicated that the substance was marijuana because of its odor, was sufficient evidence that the substance was marijuana. Although testimony by a chemist would have been preferable, there was little or no contrary evidence. State v. Ostwald (Mont.) 591 P.2d 646.

ENTRAPMENT

An undercover officer who merely went to defendant's office and asked for drugs did not entrap defendant, who was convicted of unlawful delivery of a controlled substance for giving prescription for amphetamines to officer in names of persons never examined by defendant. People v. Alford (Mich.) 275 N.W.2d 484.

EXPERT TESTIMONY

The making of direct face-to-face judgments of identification, and an awareness of the factors bearing on the reliability of such judgments are a part of everyday experiences of ordinary lay people, so that a jury is capable of making an intelligent assessment of the reliability of the identification testimony given by eyewitnesses without the need for expert testimony on stress and its affect on human perceptional processes. The testimony was not admissible under Rule 702. State v. Fernald (Me.) 397 A.2d 194.

Reliability of eyewitness testimony is not a proper topic for expert testimony but rather one which a jury may decide. It was therefore proper to exclude proffered expert testimony which was meant to challenge the general reliability of eyewitnesses because it had limited probative value which was outweighed by the prejudice to the Government and admission would have illegitimately given the aura of scientific reliability to the evidence. U.S. v. Fosher (1st Cir.) 590 F.2d 381.

JURY

Six person jury verdicts must be unanimous. Scott v. Illinois, 99 S.Ct. 1158.

INTOXICATION - MIRANDA

Although defendant was under the influence of drugs or alcohol at the time of his interrogation, the impairment of his mind had diminished when he was read his Miranda rights. He was not stoned, spoke and walked very well, and knew what he was doing, the waiver of his rights was made intelligently and voluntarily. Rodgers v. State (Ind.) 385 N.E.2d 1136.

JURORS

The fact that a juror had lunch with a state witness and a third party during recess of trial was not reversible error where evidence showed that the group did not discuss the case, so that state overcame presumption of prejudice to defendant. Hardy v. State (Ga.) 251 S.E.2d 289.

LEAVING SCENE OF ACCIDENT

"Accident" as used in statute proscribing leaving the scene of an accident resulting in personal injuries, includes all highway collisions, so defendant's defense that driving his truck into another automobile was intentional and not "accidental" got him nowhere. State v. Smyth (RI.) 397 A.2d 497.

MIRANDA

Statements made by defendant to an undercover policeman who acted as a recaptured escaped felon, were admissible even though defendant was in custody, where statements were not in response to an interrogation, but were made "in general conversation". The officer and defendant were exchanging "war stories" about how they got where they were and over the course of an entire day, without asking any specific questions, the officer got defendant to hang himself. Leuschner v. State (Md.) 397 A.2d 622.

MIRANDA - CROSS EXAMINATION

Although the state may not use defendant's silence at time of arrest as being inconsistent with his later assertion at trial of alibi, (precluded by Doyle v. Ohio), prosecutor may cross examine defendant's alibi witnesses as to why they had not told the police earlier that defendant was with them at the time of the offense. McLemore v. State (Wis.) 275 N.W.2d 692.

PRESUMPTIONS

An ironclad, conclusive, irrebuttable presumption that anyone growing marijuana was doing so for purposes of sale was unconstitutional. State, Etc. V. District Court, Etc. (Mont.) 591 P.2d 656.

MIRANDA WARNINGS

Miranda warnings were not required to be given by a police officer who was conducting an investigation, when he asked defendant his name and if he knew anything about the victim or the incident. The questioning was a proper preliminary inquiry and defendant, not yet a suspect, was not in custody for Miranda purposes. Commonwealth v. Rodlaski (Mass.) 385 N.E.2d 1379.

PLEA AGREEMENT

Double Jeopardy Clause did not bar reprosecution of defendant, whose conditional guilty plea to a lesser offense was vacated after defendant failed to perform condition of his plea that he testify against co-participants in the crime. Brown v. State (Fla.) 367 So.2d 616.

PLEA BARGAINING

Where the trial judge based defendant's sentence, at least in part, upon the fact that defendant had refused to plea bargain and had demanded a jury trial, defendant was entitled to resentencing. Whether defendant is tried by a jury or by the bench, or whether he pleads guilty is immaterial in considering sentence. (Good dissent.) In Re Lewallen (Sup.) 152 Cal. Rptr. 528.

PROBATION REVOCATION

The trial court exceeded its jurisdiction in allowing defendant to plead not guilty by reason of insanity to a petition to revoke probation. People ex rel Gallagher v. District Court, Etc. (Colo.) 591 P.2d 1015.

PROSECUTORIAL DISCRETION

It is within the prosecutor's discretion to prosecute for attempt rather than for the completed offense, as long as all of the offenses based on the same conduct be joined in one trial. State v. Moores (Me.) 396 A.2d 1010.

SEARCH AND SEIZURE - CONFLICTS OF LAW

Evidence legally seized in another state is admissible in forum state even though evidence could not have been obtained in forum state, because purposes of Exclusionary Rule would not be furthered through exclusion of evidence. People v. Blair (App.) 152 Cal.Rptr. 646.

PSYCHIATRIC EXAMINATION

Pretrial psychiatric examination of defendant by court appointed psychiatrist is not a "critical stage of the proceedings" requiring the presence of defense attorney. Defendant's rights are adequately safequarded by his opportunity to present his own psychiatrist, to cross examine the court appointed doctor, and by the statutory prohibition against the admission of defendant's statements on any issue other than his defense of insanity. People v. Larsen (Ill.) 385 N.E.2d 679.

RECIPROCAL DISCOVERY

In determining whether to permit defendant who has failed to comply with reciprocal notice of discovery to call an alibi witness, the factors which the trial court should consider are: reason for the non-disclosure, amount of evidence supporting defendant's guilt, prejudice, if any, to opposing party, feasibility of rectifying prejudice by continuance, and any other relevant circumstances. Here alibi witness was properly excluded. Clark v. U.S. (D.C. Cir.) 396 A.2d 997.

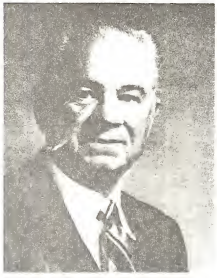
SEARCH AND SEIZURE

Officers entering a trailer in order to search for a possible burglar that a neighbor had reported, acted properly in looking only in places a burglar might hide, such as closets. Once they discovered marijuana being grown in the closets, they conducted themselves in a "laudable, exemplary and thoroughly lawful manner" when they secured the trailer, then went and got a search warrant. State, Etc. v. District Court, Etc. (Mont.) 591 P.2d 656.

Sitting en banc the Ninth Circuit reverses United States v. Fannon, 556 F.2d 961 (9th Cir., 1977) and upholds a search of airfreight by an airline employee, after the clerk thought the package might contain contraband because of defendant's suspicious behavior. United States v. Gumerlock (and Fannon) (9th Cir.) 590 F.2d 794.

BOLD LEADERSHIP

BY LEON JAWORSKI
ATTORNEY AT LAW
HOUSTON, TEXAS



Prosecutors are central figures in an unparalleled crisis on today's American scene, the solution of which must be found if the domestic tranquility the founding fathers sought to assure is not to become an empty phrase.

Commissions, after extensive studies, have filed their reports, experts have spoken and still the stubborn fact remains that the scars of crime on the face of America are becoming uglier daily. We need not review statistics except again to note the high ratio of juvenile offenders in the commission of major crime.

What prosecutors squarely need to evaluate is the contribution the administration of criminal justice - or the lack of it - is making to the existence of these conditions.

Let us take an honest inventory. In many jurisdictions, the criminal justice system is creaking and creeping, and is sorely in need of overhauling. In some jurisdictions, witnesses are imposed upon and become discouraged because of delays and unfair treatment, prospective jurors become exhausted from delays and indifferent handling, some defendants are caused to languish in jail for all too long and without the benefit of rehabilitation, underpaid prosecutors are disheartened and some too inexperienced properly to discharge the responsibilities they undertake, defense counsel score triumphs at the expense of antiquated procedures - and the end result is that society is the heavy loser.

When the district attorney took a position for the betterment of law enforcement, the public took notice and usually responded. To the average citizen he was the oracle in law enforcement. I will undertake briefly to describe him to you. He was bold without being offensive - uncompromising in the performance of his duty without being arrogant - determined without being oppressive. His official mission, then as now, was to bring to his community, with the help of other enforcement officers, a sense of security that inevitably followed a policy of strict and effective law-fulfillment. To be sure, he and his fellow-enforcers could not do it alone. The citizen had to help, but I noted that he was able to inspire his fellow-citizens to the necessary measure of appropriate involvement to get the job done.

There are those who believe - and I am one of them - that in many jurisdictions this significant relationship of yesteryear is fading.

None of us would gainsay that there is an unprecedented need for the swift and efficient disposition of criminal charges. Somehow we must strive to gear our system to this type of speedy administration without sacrificing constitutional rights.

Lord Denning, master of the rolls of London's Royal Court of Justice, placed his finger on the problem in these words: "The problem is to find the balance, the balance between the freedom of the individual on the one hand, and the security of a civilized society on the other."

The point I wish to stress is that the initiative to remedy unjust delays, for example, is the prosecutors. The modern prosecutor must follow the example of the district attorney of generations past and take his message to the people.

If the legislature, by way of illustration, persists in carrying on the statute books unreasonable grounds for continuance, the modern prosecutor must take his message to the people.

If there be insufficient courts or if there be instances where the courts fail to function, the modern prosecutor must take his message to the people.

If court decisions create an imbalance in the rights of the individual and that of society, the modern prosecutor must take his message to the people. Some have already done so and I hope more will do it over and over again.

If law enforcement officials fail, either through neglect, incompetence or because of inadequate number of facilities, the people should know about it. I predict that they will not ignore the plea.

It is high time for laggard governmental units to get in the swing on the fight on crime.

Why am I so confident that this message will not fall on deaf ears? Because I know from letters received from all sections of the country that public-spirited citizens are yearning for leadership to combat the trend of crime.

It may not increase a prosecutor's popularity with some groups to expose existing failures and deficiences, but this should not deter them. To begin with, a prosecutor is not seeking popularity at the risk of failing in his duty and, in the end, he will have won added respect from his fellow-citizen for his display of determination and courage. I have yet to see bold, courageous and sound leadership go unrecognized. Recognition does not always come forthwith, but it is sure to come in time.

The most useless public servant is the one who seeks to please all factions. Today's selfish world yearns for unselfish leadership. By reason of the office prosecutors hold, they wear the mantle of leadership. I hope they wear it boldly and wear it well. □

Public Defenders

They are now the dominant force in California criminal justice. Their influence reaches to the highest court in the state.

By Jonathan Kirsch

WHEN FARM WORKER Miguel Cortez appeared in the Superior Court of Ventura County to try to disprove that he was the father of an infant born to Julia Salas, he sat alone at the defense table because he was unable to pay for an attorney. Now, thanks to a California Supreme Court decision handed down on April 11, 1979, Cortez will get another chance to disprove paternity—and sitting next to him will be a court-appointed private attorney or, more likely, a public defender.

The domain of the public defender—a vast legal territory that has steadily expanded over the past decade, sometimes by lightning conquests and often by sweeping annexations—was enlarged once again two weeks ago by the case of *Salas* v. *Cortez*. In a majority opinion authored by Chief Justice Rose Elizabeth Bird—a former public defender—the court ruled that indigent men who are sued in civil court by the state for paternity and child support are constitutionally entitled to free legal counsel.

The ruling in *Salas* v. *Cortez*, a civil matter, follows an almost unbroken series of defense-oriented decis ons in the field of criminal law, and it reflects a subtle shift in the balance of power within the criminal-justice system in California. The defense bar—and particularly the new generation of militant public defenders—is now the cutting edge of the so-called criminal-law revolution.

Some of these decisions are notorious: *People* v. *Tanner*, the case that struck down the "use a gun, go to jail" law, and *People* v. *Caudillo*, the ruling that characterized rape as something less than great bodily injury. Other cases are rather obscure: *Hawkins* v. *Superior Court*, the ruling that severely inhibits the use of grand jury indictments in crim-

Illustrated by Bill Bramhall

inal proceedings, and *People* v. *Drew*, a decision that expands the grounds for an insanity defense in a criminal trial. But all of these cases combine to demonstrate the remarkable success of criminal-defense attorneys in forging new law before the California Supreme Court. And nearly all of these defense victories bear the concurring signature of Chief Justice Rose Elizabeth Bird, the former public defender who now leads the highest court in California.

Of course, the California Supreme Court displayed a concern for the rights of the accused long before Rose Bird was named chief justice. In fact, one of the court's most distinguished civil libertarians, Associate Justice Stanley Mosk, served as attorney general—the state's chief law-enforcement officer—before his appointment to the court by the original Governor Brown. "We are not soft on crime," insists Mosk. "We are hard on the Constitution and the Bill of Rights."

But it is Rose Bird who symbolizes the ascendency of the public defender. When Bird, fresh out of law school and a judicial clerkship, joined the highly regarded office of the Santa Clara County Public Defender in 1966, she enlisted in an aggressive and battle-hardened corps that now includes more than 1,100 public defenders throughout California. After only eight years as a deputy public defender, she was swept to the loftiest heights of the judiciary—a fact that serves to inspire her former comrades who remain on the front lines.

Rose Bird's appointment to the Supreme Court reflects the rising fortunes—and the increasing impact—of public defenders throughout California's legal system. They are no longer a tiny band of underpaid government lawyers who provide a pro forma defense for those who cannot afford to hire an attorney. Instead, they are the shock troops of the criminal-law revolution, skirmishing on the far frontiers of the Constitution, seeking out and conquering new legal territory on behalf of the poor and the powerless, raising the banner of the Bill of Rights over the least appealing among us—the murderers and rapists and child molesters, "the wreckage of humanity," as one public defender puts it—and all without a murmur of gratitude from the taxpayers who pay their salaries or the clients whose liberty they defend. "It's a martyr's life," says a former public defender who now serves as an appellate judge.

THE CURIOUS BLEND of majesty and martyrdom that characterizes the fate of Rose Elizabeth Bird offers an intriguing insight into the dilemma of public defenders at all levels of the criminal-justice system. Rose Bird is the first public defender to become a state Supreme Court chief justice—and she is the first such justice to be bitterly challenged both in the confirmation process and at the polls. Her embattled position on the Supreme Court and her reactions to that adversity reveal something about the frictions that shape the personality of a public defender.

"She once told me that justice is when the defense wins," says Stanley Voyles, one of a half dozen Santa Clara County deputy district attorneys who testified against Rose Bird during her 1976 confirmation hearings. "There's a certain type of personality—a minority among public defenders—who think that the criminal defendant is, in fact, the victim of society and that the real crime is in prosecuting."

"I suppose there are people in the D.A.'s office who think that the worst scum on earth are public defenders," says Sheldon Portman, Santa Clara County public defender. "Before the chief justice's appointment, and even today, criminal-defense lawyers have been looked down upon as second-rate. But my guess is that her appointment has enhanced the professional standing of defense lawyers."

But the bitter struggle against Bird's confirmation by district attorneys throughout the state was a reflection of the rancor that seems to prevail between public defenders and nearly everyone else in the criminal-justice system. "They're hypersensitive, hyperaggressive," complains one court of appeal judge. "I get the impression that they look upon themselves as all alone against the world." And the rancor extends to the chief justice and the other youthful veterans of the Santa Clara County Public Defender's office who followed her to the court—executive assistant Stephen Buehl, and research attorneys Nicholas Selby and Richard Neuhoff. "There's just an anger against the establishment, particularly the prosecution, and that's what the deputy D.A.s who opposed her nomination were worried about," says a court insider. "The research attorneys frequently have the capacity to mimic or rewrite the public defender's briefs in criminal appeals—and from what some of them have written in analyzing the criminal petitions that come in, they should still be paid by the public defender."

The chief justice and her staff tend to react to the atmosphere of hostility with chilly aloofness. One of her first acts on becoming chief justice was to call in a locksmith to change the locks on the door of her office suite, a precaution that did nothing to soothe the tensions within the court: "I. I she think [retired chief justice] Donald Wright was going to come in at night and go through her desk?" a court staff member remarked to *San Francisco Examiner* reporter K. Connie Kang. And when *New West* attempted to contact the research attorneys now serving on the chief justice's staff, one simply hung up the telephone and another declined to give even his job title on the grounds that "everything I do for the court is confidential."

The bunker mentality is partially explained by the chief justice's experience with hostile press coverage, a badly divided court, a bitter election campaign and now an investigation into the handling of the *Tanner* case. But another explanation can be found in Rose Bird's background as a public defender—a life of grinding adversity that, in the words of one former public defender, "turns you into a sort of paranoid cynical idealist."

"You really have to be a peculiar kind to stick it out," says Phil Pennypacker, a Santa Clara County deputy public defender whose first supervisor was Rose Bird and who went on to spend a year as executive director of the California Public Defenders Association in Sacramento "Sometimes the crush of fighting the system on every conceivable front finally gets to you. I've had cases where the judge didn't like what I was doing, the jury didn't like it, the D.A. hated it—of course—and even my client wasn't too crazy about it. You're just all alone out there."

ROSE BIRD'S ASCENSION to the Supreme Court may be seen as a belated recognition of the public defender's new prominence in the criminal-justice system—and an acknowledgement by Jerry Brown that a career as a public defender is a legitimate path to power and respectability within the establishment. But it was not always so.

Until the so-called criminal-law revolution of the sixties—when a series of United States Supreme Court decisions vastly expanded the rights of the criminal defendant and thus the practice of criminal law—justice for the poor was often a charade. As recently as the mid-fifties, in fact, the providing of legal services to the indigent was considered to be an ethical obligation of the private bar—a noble myth that veiled the reality of minimal and sometimes sham representation of the accused who could not afford to hire a lawyer.

"It was a public function subsidized by the private bar," recalls one veteran defense attorney. "It was a duty foisted on attorneys who not only had to give their own time, but who had to pay for expert witnesses, investigative services, transportation, all out of their own pocket. The young attorney who could barely make a living would be appointed, and the experienced attorney—who was better qualified and better off financially—knew the judges well enough to avoid getting appointed to handle indigents."

Even when the Legislature set up a procedure for paying private attorneys to represent the indigent, the penurious fees seemed to reflect the value placed on the

"... The fate of Rose Elizabeth Bird offers an intriguing ir sight into the dilemma of public defenders on all levels of the state judicial system ..."

lives and liberty of the poor. Although some well-qualified attorneys took their pro bono obligations seriously, most indigent cases were handled by young, inexperienced or plainly money-hungry lawyers under casual standards of competence: "When I came to San Diego in 1965, I walked into the courthouse and asked the clerk about court appointments," one attorney recalls. "He handed me a stack of complaints and said, 'You're appointed in these cases.' "

The lousy pay seemed to go along with the lousy reputation of the criminal lawyer: "When I started out, the image of the defense lawyer was of a fat, cigar-smoking guy who had an arrangement with a bail bondsman and hung around the courthouse all day making deals," says Paul Fitzgerald, a former public defender who resigned from the Los Angeles office in order to represent one of the Manson defendants and went on to a successful private practice. "The law schools didn't teach much in the way of criminal law, and the joke was that you didn't need to know much law to bribe a judge."

The Warren court changed all that. By 1963—when the indigent's right to counsel was extended to felony proceedings in state courts—county governments around the nation began looking for practical ways to fulfill their expanding constitutional obligations to the poor. What many of them chose, especially in California, was the public defender system.

Santa Clara County created its public defender's office in 1965 with a half dozen lawyers handling 4,000 cases a year; today, a staff of 59 defenders carries an annual caseload of 25,000. The office of the Contra Costa County Public Defender opened in 1966 and handled 3,500 cases in its first full year of operation; today, a staff of 37 attorneys handles nearly 12,000 cases a year. Alameda County's office, which dates back to the twenties, handled 7,500 cases with a staff of 20 lawyers in 1965; today its 97 assistant public defenders ("We don't like to call them 'deputies,' " explains chief assistant public defender James Jenner, "because it sounds too much like law enforcement to our clients") carry an annual caseload of 35,000. And the mammoth, 65-year-old Los Angeles County Public Defender's office—the first such institution in the United States—includes some 362 attorneys who handle a staggering 225,000 cases and proceedings every year.

Although some counties still assign indigent cases to private attorneys—or, as in San Diego, enter into contracts with nonprofit legal corporations—the public defender is becoming the dominant force in California's system of criminal justice. In Los Angeles County, for instance, privately retained attorneys handled only 29 percent of some 11,500 felony cases studied in a 1976 report; the rest were represented by the public defender or, when a conflict of interest prevented the office from taking a client (in only 6 percent of the cases), by court-appointed private counsel.

And the public defenders, once confined to felony trials, are showing up in new and sometimes surprising places. Thanks to an expanding mandate in both statutory and case law on indigent defense, the public defenders now represent defendants charged with both felonies and misdemeanors. They represent minors in juvenile court. They represent parents whose custody of their children is being challenged on grounds of neglect or abuse. They represent the old and the mentally ill in conservatorship and civil commitment hearings. They represent mentally disordered sex offenders and mentally incompetent defendants in state hospitals. They even go into civil court to represent indigents charged with contempt of court in family matters, workers whose wages are subject to garnishment, and any civil litigant who, "in the opinion of the public defender, is being persecuted or unjustly harassed." And now they will defend indigent men who are sued by the state for paternity in civil court.

A 1975 statute created the office of the State Public Defender—an appointive position now occupied by Quin Denvir—to represent indigent criminals in the appellate courts. His 90 deputies handle about half of all indigent criminal appeals (including all death-penalty cases); the office also lobbies aggressively before the Legislature on a wide range of defense-oriented issues, represents convicts in habeus corpus proceedings and before the Community Release Board, and—on at least one occasion—has filed claims for money damages on behalf of their clients against the state of California. "They have acted more like a public-interest law firm than a state-funded agency whose duties are prescribed by statute," complained one assistant attorney general in an internal Department of Justice memorandum. "We have also been impacted by a certain arrogance characterizing the state public defender's work."

What the attorney general perceives as arrogance may be the new esprit that has transformed public defenders from anonymous government fawyers into sharp, sophisticated advocates. Although outright acquittals at trial or reversals of convictions in the court of appeal are still rare—some 90 percent of all cases are bargained out with a guilty plea and a reduced sentence, and only 6 to 8 percent of criminal cases argued before the court of appeal are reversed—the mission of the public defender goes far beyond the courtroom.

Public defenders are represented by the 450-member California Public Defenders Association and are counted among the 1,500 members of the California Attorneys for Criminal Justice; both organizations sponsor advanced seminars on criminal law and courtroom technique, make appellate briefs available to lawyers in statewide "brief banks," lobby on issues ranging from mandatory sentencing to the building of new prisons, file *amicus curiae* briefs in crucial appellate cases in the state and federal courts, and defend fellow attorneys when a judge responds to zealous advocacy with a contempt citation. In Washington, D.C., the interests of the public defenders are represented by the National Legal Aid and Defenders Association; and in Houston, the National College for Criminal Defense Attorneys offers specialized training for both public defenders and private defense attorneys.

A recent lobbying effort demonstrates the political reach of the public defenders. A bill introduced in last year's session by Assemblyman Mel Levine—a West Los Angeles Democrat who is considered to be the public defenders' friendliest vote on the liberal Criminal Justice Committee—would have expanded the scope of appellate review in criminal cases and thus opened new legal territory for public defenders. Although the bill never emerged from committee after criticism from judges as well as prosecutors, the state public defender's office—which drafted the legislation and lobbied for it—drafted a new version of the bill, and the revised measure has been introduced in this session of the Legislature by criminal justice committee member Elihu Harris, a Democratic assemblyman from Oakland.

Militants among California's public defenders see these skirmishes as the first steps toward matching the strength, size and influence of the much larger law-enforcement establishment. In some counties, the salaries of public defenders are pegged by law to those of the district attorney: "Ideological parity," says John Cleary of San Diego's Federal Defenders, Inc., whose $47,500-a-year salary equals the U.S. attorney's. California's Office of Criminal Justice Planning, which administers federal grants offered by the Law

Enforcement Assistance Administration, is being pressured by public defender organizations to spend at least some of its funds on defense services. And advocates representing the California Public Defenders Association and the state public defender are often joined by local public defender offices in taking on the entrenched law-enforcement lobby.

"When I was lobbying for the ACLU in 1967, we were really the only lobby that concerned itself with the rights of criminal defendants," explains Paul Halvonik, the founding state public defender who was named to the court of appeal by Jerry Brown. "On the other side were the Association of Deputy District Attorneys, the California Police Officers Association, the attorney general, and the various D.A.s and police departments who sent up their own people. You'd win a victory in the courts and then they'd come up and whip you in the Legislature. So the response was bound to come from public defenders to get organized." Says Paul Fitzgerald, one of the founders of California Attorneys for Criminal Justice: "We needed to unite almost like a trade union—not to help ourselves but to help our clients. We wanted to maximize our power."

The existence of an organized public defender's office gives the defense an advantage that once belonged only to the district attorney. Most public defenders can call on staff investigators and expert witnesses; the daily exposure to the workings of the criminal courts gives the public defenders an intimate knowledge of the style and sentencing tendencies of every judge and district attorney ("The first thing I do in a strange court," says one private attorney, "is look up the local public defender and ask him: 'What's the story on the judge?' "); and a coordinated challenge by a public defender's office can literally put a judge out of business. In Ventura County, for instance, public defender Richard Erwin temporarily forced a newly elected superior court judge off criminal cases after the judge announced that he would no longer accept plea bargains: "We said, 'Oh, that's lovely, judge,' " Erwin says. " 'If you don't accept any plea bargains, then you're not going to hear any pleas.' " The judge ultimately relented in an elaborate compromise that allows the public defender to plea-bargain on behalf of his clients.

Today, in an era of diminishing government spending on social services and public employment, the public defender holds the ultimate weapon—a clear constitutional mandate for his existence and his expanding role. Under what is called a Ligda motion (named after a court case involving the Solano County public defender, Paul Ligda), an overworked public defender's office can simply refuse to take new cases, thus forcing the county or the courts to hire more public defenders or else to pay private attorneys to handle the excess caseload.

"Our staff was damn near mutiny or mass resignation because of the case overload," recalls former Contra Costa County Public Defender William Higham, who declined to take new cases on three different occasions. "The responsibility of the attorneys was to guarantee that our clients received due process of law, and if that meant pulling them out of court, the Constitution prevailed over the budgetary considerations of the county."

Although some post-Jarvis budgets have eroded the manpower of a few public defender's offices—and slowed the growth of the state public defender—the search continues for new issues, new clients and new roles for the public defender. The newsletter of the California Public Defenders Association carries a regular feature called "Appellate Issues Looking for Cases." The aggressive young public defender of Tulare County, Walter Gorelick, recently filed a brief in Fresno on behalf of the California Public Defenders Association in a case that would establish the right of public defenders to go into jails and prisons and offer their services to the inmates. The state public defender has actively urged Shasta County to set up a public defender office to replace its current system of contracting with private attorneys for indigent defense—a practice that resulted in two attorneys' receiving some $63,000 to handle 1,929 cases in 1977. And imaginative public defenders envision the day when they will appear in new settings on behalf of new clients—license-revocation hearings in the Department of Motor Vehicles, for instance, or in school disciplinary proceedings.

"The public defender is becoming the great champion of the underdog, the advocate of civil rights in the community, the provider of relief in areas where relief doesn't exist," declares San Francisco Public Defender Jeff Brown, the governor's first cousin and the only elected county public defender in California. (All others are appointed by county government.) "You'll find the whole mentality of the public defender is changing—it's a much more activist breed."

"They've been pushing for a long time," sighs one district attorney. "And they're still shoving."

THE ULTIMATE IRONY OF the public defender's life is that the harder he tries to do his job, the less he is appreciated. The bad rap comes from law enforcement ("They're running amuck," says one deputy attorney general), from the courts of appeal (the state public defender's arguments in one case were characterized by a judge as "frivolous, manufactured out of whole cloth and result[ing] in an inexcusable imposition upon scarce judicial resources"), and even from their own friends and families ("You are constantly asked: 'How can you represent killers, robbers and rapists? How does it feel to get a guilty man off and back on the streets to commit more crime? Do you take the mirrors out of your house?' "). But the cruelest cut of all comes from the public defender's own clients, who routinely refer to the public defender as "dump truck" or "scumbag" or even worse.

Despite the zeal of most public defenders—and their uncompromising insistence on acting as independent advocates for their clients—they are distrusted and often despised by many jail-hardened and streetwise defendants. A recent study by a Stanford political science professor concluded that "defendants tend to see public defenders as less willing to listen to their clients and tell them the truth, less committed to fighting hard, and more concerned with getting cases over with." In Los Angeles, for instance, one defendant found that the only way to convince the judge to dismiss his public defender and appoint a private attorney was to physically assault the lawyer in open court; the incident prompted a flurry of similar courtroom attacks on public defenders. "The word got around down at County Jail," recalls one prosecutor, "that the best way to dump your public defender was to punch him out."

The competence of the public defenders is hardly at issue. Thanks to the overproduction of new lawyers and the resulting competition for jobs—which can pay up to $42,000 a year for a senior trial attorney, plus a generous package of benefits that would be hard to match in private practice—the state and county public defender offices can attract some of the very best young lawyers in California: "They'll prepare for the civil service exam like they did for the bar exam," says L.A. County deputy public defender Michael Adelson. Nor can the public defender be faulted for any lack of dedication: "They'll kill themselves for their clients," says L.A. County chief deputy district attorney Stephen Trott. "They're like doctors who would put Lee Harvey Oswald back together."

The public defender turns out to be the victim of a persistent assumption of American life: "In our society, you get what you pay for," says John Cleary of Federal Defenders, Inc. "So if you pay nothing, you think you're getting nothing." And the fact remains that most defendants are suspicious of lawyers who work for the same government that is seeking to put them behind bars. "I don't want a public defender—I want a real lawyer," goes the refrain. "Do you have to go to law school to be a public defender?" And: "After you've been a public defender long enough, do they make you a district attorney?"

"It is almost a truism that a criminal defendant would rather have the most

"... The bad rap against public defenders comes from cops, judges—and from their own clients..."

inept private counsel than the most skilled and capable public defender," wrote court of appeal presiding justice Robert Gardner in a memorable footnote to *People* v. *Huffman*, a decision that can be found in nearly every public defender's office as a kind of scripture. "Often the arraigning judge appoints the public defender, only to watch in silent horror as the defendant's family, having hocked the family jewels, hire a lawyer for him, sometimes a marginal misfit who is allowed to represent him only because of some ghastly mistake on the part of the bar examiners."

The pervasive distrust of the public defender among his clients often prompts the attorney to push himself to the outer limits of zealous advocacy. "It's very important for all public defenders to play a role that convinces the criminal defendants that they're dealing with someone in their own corner and not just another government agency," says Kent Richland, a former deputy state public defender who now works on the staff of the court of appeal. "That kind of image is enhanced by actions above and beyond strict advocacy."

As a matter of simple psychological survival amid the Grand Guignol of the criminal courts, the public defender must harden himself against all the gruesome snapshots of murder victims—"If people get stabbed, they bleed," shrugged one veteran public defender—and look beyond the crimes of his client. "Half the time I don't read the papers or watch TV programs because I'm rather sensitive to violence," says former public defender William Higham. "But one differentiates between the acts and the human being. You get behind the mind of the person who was the instrumentality through which the acts happened. You find yourself saying: No matter what you did, I like you, I'm fond of you, and I'm going to fight for you. I personally represented a young man who was probably one of the most hated people in Contra Costa County—he was accused of some pretty grim murders that horrified people in the county, and he was ultimately sentenced to death, but we saved him on appeal. To this day, he is a close friend of mine; we write to each other; he phones me at home from San Quentin. To me he is not an awful person—he is a wonderful person who got into or of these binds where he became psychiatrically quite disturbed."

Sometimes the strong sense of identification with the client can be treacherous for the criminal advocate. "I know people who are so overwhelmed with sympathy for the defendant that they screw up the trial because they don't see the weaknesses of the case," says Wilbur Littlefield, Los Angeles County public defender. And an excessive sense of idealism can be treacherous for the clients of the public defender, too: "Sometimes the people with the greatest social commitment don't last very long," says Littlefield. "They can't accept the fact that some defendants smell bad. They want to jump on a horse and tilt at windmills, but they don't like the fact that no matter how good a job they do for the defendant, they're not likely to get thanked for it."

THOSE PUBLIC defenders who don't burn out or drop out or defect to the district attorney can look forward to an odd blend of grueling stress in the courtroom and bland sinecure as a county employee. Only a very few will reach the rarified heights of judicial power and prestige where Rose Bird now finds herself; most will battle not against fellow justices of the highest court in the land, but rather the conviction-hungry prosecutors and the hard-sentencing trial judges and the poor people—sometimes vicious, sometimes hapless—who populate the criminal courts. But every public defender will suffer the daily ordeal of unceasing adversity and unappreciated advocacy—the cycle of heroic striving and infrequent victory—that help to explain the hardened personality and tough personal style of Chief Justice Rose Elizabeth Bird and the other former public defenders who surround her on the staff of the Supreme Court.

"It's like being shanghaied into the lower middle class," explains Paul Fitzgerald, one public defender who made the difficult leap into a well-paying private practice. "It's a life of coffee out of Styrofoam cups bought from blind cash-register operators in courthouse cafeterias. It's the prospect of spending the rest of your life in the same gray government building every day. You see too many imperfections too intensely—you see the hypocrisy of a society that creates criminals and then turns around with outraged indignation and demands that we do something about it. We save people's kidneys with transplants, we fly vaccines around the world, but we don't do a damn thing for these people. You see them thrown into the joint, but you know that's not the answer—they're not going to come out any better, they're going to come out worse. You get real cold—real fucking hard—and then you say: What am I doing here? What are we all doing here?"

RESOLUTION

RESCISSION OF FEDERAL FINANCIAL PARTICIPATION IN CHILD SUPPORT ENFORCEMENT OF CASES NOT ON PUBLIC ASSISTANCE

WHEREAS, Section 455(a) of the Social Security Act provides for the termination of Federal financial participation in the enforcement of child support and establishment of paternity in nonpublic assistance cases after September 30, 1978; and

WHEREAS, the Senate and House of Representatives of The United States of America enacted Public Law 95-482 on October 18, 1978, providing for the continuance of appropriations for fiscal year 1979; and

WHEREAS, the Department of Health, Education and Welfare of the Child Support Enforcement issued an interpretation of Public Law 95-482 in OCSE-AT-78-23 on November 29, 1978, providing therein that Federal financial participation in child support enforcement of nonpublic assistance cases was to continue for fiscal year 1979 at the fiscal year 1978 rate; and

WHEREAS, the Department of Health, Education and Welfare, Office of Child Support Enforcement, issued an opposite interpretation of Public Law 95-482 in OCSE-AT-79-1 on April 6, 1979, based upon an opinion issued by the Comptroller General of the United States on March 28, 1979. Said opinion provided that, absent specific legislation repealing or delaying the termination date of Federal financial participation, Federal funding is not available for expenditures made in nonpublic assistance cases; and

WHEREAS, the Department of Health, Education and Welfare, Office of Child Support Enforcement, intends to make the termination of Federal financial participation in nonpublic assistance cases retroactive to October 1, 1978; and

WHEREAS, the various states of the United States of America have made expenditures, developed budgets, hired and trained staff and developed programs and resources all in reliance upon the availability of Federal financial parti-

cipation in nonpublic assistance cases that was communicated to them by the Department of Health, Education and Welfare, Office of Child Support Enforcement in the interpretation issued in OCSE-AT-78-23 on November 29, 1978; and

WHEREAS, the termination of Federal financial participation in nonpublic assistance cases will severely damage the programs and budgets that have been developed in the various states of The United States of America;

THEREFORE, it is hereby resolved that the following action will be taken:

1. The officers and members of the staff of the National Association of Attorneys General will keep the members of the National Association of Attorneys General apprised of the status of the situation and will make recommendations for action as necessary.

2. The officers and members of the staff of the National Association of Attorneys General will review developments in connection with the contemplated class action seeking to restrain the Department of Health, Education and Welfare from the withholding of funds and will make recommendations to the members of the National Association of Attorneys General concerning the participation of individual states in such class action.

3. The officers and members of the staff of the National Association of Attorneys General will communicate to government officials and representatives in Congress the concern of the members of the National Association of Attorneys General over the loss of funding to the Child Support Enforcement Program in nonpublic assistance cases after commitments had been made and services rendered.

TWENTY-FIVE SUGGESTIONS TO A WITNESS

1. Before you testify, try to picture the scene, the objects there, the distances and just what heppened so that you can recall more accurately when you are asked. If the question is about distances or time, and if your answer is only an estimate, be sure you say it is only an estimate.

2. A neat appearance and proper dress in court are important.

3. Avoid distracting mannerisms, such as chewing gum or smoking while testifying, and while taking the oath, stand upright, pay attention and say, "I do", clearly.

4. Don't try to memorize what you are going to say. This is unnecessary, but do try to go over those matters upon which you will be examined in your mind prior to trial.

5. Be serious in the courtroom. Avoid laughing and talking about the case in the presence of the jury or anywhere in the courthouse where you may be observed.

6. Speak clearly and loudly enough so that the farthest juror can hear you easily.

7. Listen carefully to the questions asked of you. No matter how nice the attorney may seem on cross-examination, he may be trying to discredit you. Understand the question, have it repeated if necessary, then give a thoughtful, considered answer. Do not give a snap answer without thinking. Don't rush into answering, but neither should there be an unnaturally long delay to a simple question if you know the answer.

8. Explain your answer, if necessary. Give the answer in your own words, and if a question can't be truthfully answered with a "yes" or "no", you have a right to explain the answer.

9. Answer only the question asked you. Do not volunteer information not actually asked for.

10. If your answer was not correctly stated, correct it immediately. If your answer was not clear clarify it immediately.

11. The judge and jury are interested only in the facts. Therefore, don't give your conclusions and opinions unless specifically asked.

12. Unless certain, don't say "That's all of the conversation" or "nothing else happened". Instead say, "That's all I recall," or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.

13. Always be courteous, even if the lawyer questioning you may appear discourteous. Don't appear to be a cocky witness. This will lose you the respect of the judge and jury. Any lawyer who can make a witness mad will probably cause the witness to exaggerate, appear unobjective, and emotionally unstable. Keep your cool.

14. You are sworn to tell the truth. Tell it. Every material truth should be readily admitted, even if not to the advantage of the prosecution. Do not stop to figure out whether your answer will help or hurt your side. Just answer the questions to the best of your memory. Do not exaggerate.

15. Stop instantly when the judge interrupts you, or when an attorney objects to a question.

16. Give positive, definite answers when at all possible. Avoid saying, "I think," "I believe," or "in my opinion," if you can be positive. If you do know, say so. Don't make up an answer. You can be positive about important things which you naturally would remember. If asked about little details which a person naturally would not remember, it is best just to say so if you don't remember. But don't let the defense lawyer get you in a trap of answering question after question with "I don't know".

17. Try not to seem nervous. Avoid mannerisms which will make the judge or jury think you are scared, or not telling the truth or all that you know.

18. Above all - this is most important - do not lose your temper. Remember that some attorneys on cross-examination will try to wear you out so you will lose your temper and say things that are not correct or that will hurt you or your testimony. Keep your "cool".

19. If you don't want to answer a question, don't ask the judge whether you must answer it. If it is an improper question, the State's Attorney trying the case will take it up with the judge. Don't ask the judge for advice.

20. When being questioned by defense counsel don't look at the State's Attorney or at the judge for help in answering a question. You are on your own. If the question is improper the State's Attorney will abject. If a question is asked and there is no objection, answer it. Never substitute your ideas of what you believe the rules of evidence are.

21. Never argue with the defense attorney.

22. Do not nod your head for a "yes" or "no" answer. Speak so that the court reporter (or recording device) can hear the answer.

23. When coming from the witness stand after testifying, wear a confident expression, but do not smile or appear downcast.

24. Sometimes, not often, a defense attorney may ask this question, "have you talked to anybody about this case?" If you say, "no", the judge or jury knows that isn't right because good prosecutors try to talk to a witness before he takes the stand. If you say, "yes", the defense lawyer may try to imply that you have been told what to say. The best thing to do is to say very frankly that you have talked with whomever you have talked with - State's Attorney, victim, other witnesses, relatives - and that you were just asked what the facts were. All that we want you to do is just to tell the truth as clearly as possible.

25. Now, go back and re-read these suggestions so you will have them firmly in your mind. We hope they will help. These aren't to be memorized. If you remember you are just talking to some neighbors on the jury, you will get along fine.